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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

99-68

Inter-Carrier Compensation for ISP-Bound Traffic	))))	CC Docket No. 99-68

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SUMMARY

Now that the Commission has correctly determined that LECs provide interstate access service when they carry Internet-bound calls from subscribers to the subscribers' Internet service providers ("ISPs"), it should treat the case where *two* LECs carry such traffic exactly as it would any other collaboratively provided interstate access service. The Commission should clarify that when an Internet-bound call from an ISP subscriber to the ISP transits two LECs, the LECs are *jointly* providing the ISP with a single access service. Under Commission precedent for jointly provided access, the two LECs should share the revenues for this interstate access service pursuant to a formula to be negotiated between the LECs or set by industrywide agreement. The same approach should govern where two LECs carry traffic jointly from a subscriber to an ISP, except that the amount of revenue to be shared is different. Because ISPs pay business exchange service prices for interstate access (a rule that U S WEST does not propose revisiting in this proceeding), each LEC should receive some portion of the intrastate business exchange prices paid by the ISP. The precise allocation should be determined by a revenue-sharing agreement between them. In no circumstances should the Commission permit one LEC to charge the other for carrying traffic to an ISP.

U S WEST therefore agrees with the Commission's tentative conclusion that LECs should be permitted to negotiate revenue sharing arrangements with each other for their joint provision of interstate access to ISPs. The negotiations should take place against the backdrop of Commission rules articulating the above standards, and should be subject to review only by the Commission, just as is the case for every other interstate access service. It would be

both inappropriate and unlawful to subject these negotiations to binding state commission arbitration under sections 251 and 252 of the Telecommunications Act. The Act limits state commissions' arbitration authority to the specific duties laid out in sections 251 and 252, which do not cover the joint provision of interstate access. Moreover, if the Commission hopes to foster meaningful commercial negotiations over revenue sharing, it must prevent CLECs from attempting to use section 252(i) to trump the negotiating process and extend the improper payment of reciprocal compensation indefinitely.

In response to the Commission's inquiry, U S WEST notes that it is not feasible to separate ISP-bound traffic into interstate and intrastate components. LECs have no way of knowing whether an ISP subscriber, once connected to the ISP, is at any given moment accessing local content maintained or hosted by the ISP, an in-state server maintained by a third party, or an out-of-state or foreign server. While ISPs do in theory have some ability to track their subscribers' movements across the Internet, web-site mirroring and caching make such tracking imperfect at best, and requiring ISPs to aggregate and report tracking data would increase their costs greatly and raise privacy concerns.

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COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above docket.[1/]

INTRODUCTION

Now that the Commission has correctly determined that a subscriber's dial-up call to an Internet service provider ("ISP") is a form of interstate access service (at least when the subscriber connects to an out-of-state web server), the Commission should treat the case where *two* LECs carry such a call exactly as it would for any other interstate access service. Under existing law, when two local exchange carriers ("LECs") jointly provide an access service to an interexchange carrier ("IXC"), each LEC shares in the charges paid by the IXC for that service, with the allocation determined by a bilateral or industrywide revenue sharing arrangement subject only to (limited) Commission oversight. In this way, each LEC has an opportunity to recover its costs. The same practice should apply when a subscriber's call to an ISP transits two LECs. The only relevant difference between an ISP and a typical IXC is that the former will, in most instances, pay a price for its access that is based on the LECs' intrastate local exchange

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1/ Notice of Proposed Rulemaking, *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 99-68 (rel. Feb. 26, 1999) ("*NPRM*").

tariffs, while the latter must pay prices taken from the LECs' interstate access tariffs. But this difference should affect only the *amount* of revenue to be shared between the LECs, not the sharing obligation itself.

The Commission should adopt rules clarifying that, when two LECs jointly carry a subscriber's dial-up call to an ISP for connection to the Internet, both carriers should share in the revenues received from the ISP for this access service pursuant to a negotiated agreement, and the payment of reciprocal compensation from one LEC to the other is inappropriate. LECs should negotiate against the backdrop of these rules to determine an appropriate allocator or other sharing factor. U S WEST agrees with the Commission that these negotiations should be "driven by market forces" and that the Commission should not prescribe the precise content of sharing agreements. *NPRM* ¶ 29. But the Commission must adopt procedures that allow meaningful commercial negotiations to take place. It is no more appropriate for state authorities to impose sharing agreements by regulatory fiat than it would be for the Commission to do so; moreover, the 1996 Act bars state commissions from imposing terms related to interstate access (which is *not* the subject of any duty under sections 251(b) or (c) of the Act) in the context of a section 252 local interconnection arbitration. In addition, the Commission should clarify that CLECs may not use the "most favored nation" provision of the Act, 47 U.S.C. § 252(i), to trump commercial negotiations and extend the improper payment of reciprocal compensation indefinitely, as many are attempting to do now.

ARGUMENT

I. THE COMMISSION SHOULD CLARIFY THAT THE USUAL CARRIER COMPENSATION PRACTICES FOR INTERSTATE ACCESS SERVICES APPLY WHEN TWO LECS CARRY ISP-BOUND TRAFFIC JOINTLY.

In the *Reciprocal Compensation Declaratory Ruling*,[2] the Commission correctly determined that (1) a substantial portion of Internet-bound traffic is interstate because the traffic ultimately terminates at an out-of-state or foreign web server, and (2) when a LEC carries an ISP subscriber's call to the ISP for connection to such a server, the LEC provides an interstate access service. *See Reciprocal Compensation Declaratory Ruling* ¶¶ 16, 18. In determining what rules should apply when two LECs work together to complete a subscriber's dial-up call to an ISP, the Commission should follow the same principles that govern jointly provided interstate access in every other instance.

Under Commission precedent, when an interstate access transmission transits two LECs' networks on its way from a local caller to the access customer (or vice versa), the LECs are deemed to be *co*-providers of the customer's access service. The LECs *share* both the costs of access and the access revenues from the customer; one LEC does not simply "claim" the customer and charge the other for connecting calls to it. *See Reciprocal Compensation Declaratory Ruling* at ¶ 9 ("When two carriers jointly provide interstate access (*e.g.*, by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider."); Mem. Op. and Order, *Investigation of Access and*

[2] Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98 (rel. Feb. 26, 1999) ("*Reciprocal Compensation Declaratory Ruling*").

Divestiture Related Tariffs, 97 F.C.C.2d 1082, 1176-77 (1984) (rejecting single-carrier billing for jointly provided access services). The precise sharing arrangement is set either by industrywide guidelines (such as those of the Ordering and Billing Forum of the Exchange Carrier Standards Association) or by a specific agreement between the LECs. Where possible, the LECs will employ an industry-standard "meet point billing" arrangement that uses network distances as the allocator. *See* Mem. Op. and Order, *Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 2 FCC Rcd 4518, 4519 (1987). If a given access service (such as Feature Group A) cannot be provided in a way that permits the LECs to measure and exchange usage data, the LECs will share access revenues by means of a bilateral agreement "that [is] designed to recover *both* the primary and secondary exchange carrier's costs" using some other allocator as a proxy for usage. Mem. Op. and Order, *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 7183, 7185-86 (1989) (emphasis added).

There is no reason why the Commission can or should disregard these precedents and apply a different rule to ISP dial-up access service. ISP dial-up access is precisely analogous to jointly provided Feature Group A service: Both are line-side connections that allow end users to dial a local number to reach an interstate service provider, which then switches the transmission to its ultimate destination using additional information provided by the end user. ISPs purchase the same kind of local line as Feature Group A customers. In the case of jointly provided Feature Group A, LECs negotiate bilateral revenue sharing agreements; when switched-based record exchange is not possible for this service, these agreements generally use the number of access lines each carrier serves in a given area to allocate the access revenues received by the

LEC directly serving the IXC. The same type of revenue sharing agreements could be negotiated for ISP dial-up service, perhaps using the number of non-ISP end-user access lines each LEC serves (as self-reported by the LEC) as the allocator. (As explained in more detail below, the LECs should be permitted to negotiate whatever allocator they choose.)

The only difference between the typical IXC access customer and an ISP is the price list that each uses. IXCs purchase interstate access from LECs' federal access tariffs; hence, where two LECs collaborate to provide access to an IXC, they share (according to the applicable formula) the carrier charges contained in these interstate tariffs. By contrast, under the Commission's current rules for enhanced service providers ("ESPs"), ISPs providing interstate service purchase interstate access from their LECs' intrastate exchange tariffs using the prices for local business lines.[3/] In both instances, the relevant connection is interstate, and the LEC service constitutes interstate access; the only practical difference is that the access revenue in each case is based on a different set of prices, and different numbers go into the revenue sharing formula when two LECs provide the access service jointly. The Commission has just made clear that an ISP's purchase of PSTN links from a LEC's local tariff does not change the reality that it "in fact use[s] interstate access service." *Reciprocal Compensation Declaratory Ruling* ¶ 16. Indeed, the Commission has noted repeatedly that ESPs using LECs' intrastate tariffs are simply purchasing interstate access services at local exchange prices, not local

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3/ U S WEST does not propose revisiting these rules in this proceeding, but does not thereby concede their correctness. Those rules stand or fall on their own merits and, as explained in the text, only incidentally affect the substantive principles articulated in these comments.

exchange service itself.[4] The business-line revenues that LECs receive from ISPs that provide interstate services are therefore in fact *access* revenues, even though the prices are stated in LECs' local exchange tariffs. Under Commission precedent, these access revenues must be shared where two LECs carry dial-up traffic between an ISP and its subscribers, regardless of whether the LEC directly serving the ISP is an ILEC or a CLEC.[5]

The Commission would not be disturbing the so-called "ESP exemption" by acknowledging that the business-line charges ISPs now pay for subscriber dial-up lines are in fact access revenues that should be shared among all the LECs who carry a dial-up call. Under the approach suggested here, ISPs' access services would still be rated under the same local tariffs that govern those access services today. Even with revenue sharing, an ISP would still pay a price for its dial-up lines that is stated in its LEC's intrastate local exchange tariffs. At the same time, permitting all the LECs who collaborate on a dial-up call to share in the revenue

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4/ *See Reciprocal Compensation Declaratory Ruling* ¶ 5 ("ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices."); Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2635 n.8 (1988) (same); *id.* at 2637 n.53 (ESPs "may use local business lines for access for which they pay local business rates."); Mem. Op. and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 712 (1983) (ESPs "are obtaining exchange access at ordinary business local exchange service rates"); *id.* at 715 (ESPs "are currently paying local business exchange service rates for their interstate access").

5/ At one point the NPRM states ambiguously that, as a result of the ESP exemption, LECs do not receive any "access revenues" from ISPs at all. *NPRM* ¶ 26 n.84. It is unclear from the context whether this is a substantive pronouncement or simply a summary of another commenter's *ex parte*. As noted in the text, the Commission has contradicted this statement many times by declaring that ESPs in fact pay local exchange prices *for access services*. But if the Commission ultimately decides that what ISPs currently pay for access is not in fact shareable "access revenue," the appropriate compensation rule would be for each LEC to keep (and be limited to) the revenues collected from its own end users. In no event should the LEC serving an ISP subscriber be required to pay anything to the LEC serving the ISP.

received from the ISP would recognize that Internet-bound dial-up traffic imposes costs on *each* of these LECs, not just the LEC who signs up the ISP as a customer. As U S WEST has demonstrated to the Commission before, the much-longer-than-average holding times of ISP-bound dial-up calls impose significant costs on the LECs serving the ISP subscribers, even if the calls are handed off to another LEC who actually carries them to the ISP.[6] To be sure, an allocation of the LEC's business-line rate is not a perfect (or adequate) measure of those costs, but adjusting the charges paid by ISPs to reflect the costs they impose on the PSTN is beyond the scope of this proceeding. The point here is simply that the existing pricing structure for ISPs — though in need of reform in its own right — can accommodate revenue sharing for jointly provided interstate access without any changes.

Commission precedent and good policy therefore require that the LEC serving an ISP's dial-up subscriber be permitted to share in the access revenue received from the ISP (and now kept only by the LEC that serves the ISP). At several points in the NPRM, however, the Commission suggests that it is considering proposals that would continue to require the LEC serving an ISP's subscribers to continue making payments to the LEC serving the ISP. *See, e.g.*, *NPRM* ¶ 33. In no event would this be appropriate or lawful. It is the ISP that uses the interstate access service in question and must pay for it in some form, not the ISP's subscribers, and

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[6] *See* Comments of U S WEST, Inc., *Notice of Inquiry Concerning Information Service Providers*, CC Dkt. Nos. 96-263, 96-262, 94-1, and 91-213 (filed Mar. 24, 1997). These comments contained a study demonstrating that the average length of a call to an ISP was 14 minutes, compared to four minutes for the average residential voice call and two minutes for the average business voice call. This study was completed before the proliferation of ISP service plans offering subscribers unlimited Internet use for a flat monthly fee; it therefore clearly understates the impact of ISP-bound calls on the circuit-switched voice network.

certainly not one of the serving carriers. How the ISP chooses to recover such costs should be a matter between it and its subscribers; it should not involve the subscribers' LEC (which has no direct relationship with the ISP) at all. While it is true that, "no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network," *NPRM* ¶ 29, it is up to the LEC serving an ISP to ensure that the price it charges the ISP for a business line recovers that cost *without* any subsidy from the subscribers' LEC. Any other rule simply perpetuates irrational pricing, inefficient entry, and unfair subsidy.

II. THE COMMISSION SHOULD ADOPT PROCEDURES THAT PERMIT LECS TO FREELY NEGOTIATE MARKET-DRIVEN REVENUE SHARING AGREEMENTS.

U S WEST agrees with the Commission's conclusion that voluntarily negotiated revenue sharing arrangements for ISP-bound traffic are preferable to arrangements imposed by regulatory fiat. *NPRM* ¶ 29. But some Commission rules are still necessary to ensure that carriers' negotiations are in fact "driven by market forces" (*id.*) rather than by the pursuit of regulatory advantage. The Commission should set clear ground rules establishing the right of *all* collaborating LECs to share in ISP dial-up access revenues and barring the LECs that serve ISPs from demanding payment from the LECs serving the ISPs' subscribers. The Commission should also adopt procedures that prevent carriers from using regulation to undercut negotiations, frustrate the development of industrywide solutions, or perpetuate the improper payment of reciprocal compensation.

U S WEST submits that the Commission here should follow the same approach that has worked for every other jointly provided interstate access service: It should adopt national ground rules establishing revenue sharing, permit LECs to negotiate bilateral sharing agreements and industrywide allocation standards against the backdrop of these rules, and subject negotiated agreements to limited and exclusive Commission review. The Commission should not (and legally may not) depart from this practice by authorizing state commissions to impose state-specific intercarrier compensation obligations in the context of section 252 arbitrations. Nor should it permit CLECs to make the Commission's rules a nullity by using the "most favored nation" provision of the Telecommunications Act to extend the improper payment of reciprocal compensation indefinitely.

A. LEC Negotiations Should Take Place Against a Backdrop of Commission Rules and Be Subject Only to Commission Review.

The Commission should follow the same approach that it has for other jointly provided interstate access services. For these other services, the Commission clearly established the obligation of all collaborating LECs to bill for the service jointly and share the revenues. *See, e.g.*, Mem. Op. and Order, *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1176-77 (1984). It then permitted LECs to negotiate revenue sharing agreements among themselves either bilaterally or through industrywide agreement, with minimal Commission prescription of the content of such agreements. *See, e.g.*, Mem. Op. and Order, *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 7183, 7185-86 (1989) (laying out the carrier negotiation process for jointly provided Feature Group A). The Commission has exercised exclusive jurisdiction over these sharing agreements and industrywide standards through its review of carriers' interstate access tariffs, and it has never suggested that its review procedures have been inadequate to ensure that collaborating LECs are fairly compensated for their services.

There is every reason to think that such a regime would work for jointly provided ISP dial-up access services. Once the Commission adopts clear, carrier-neutral rules confirming that *every* LEC that participates in carrying a dial-up call from a subscriber to an ISP is entitled to share in the revenues from that access service (thereby finally putting reciprocal compensation to rest), ILECs and CLECs should be able to agree on a method for allocating charges and revenues, just as ILECs and CLECs have been able to do for other jointly provided access services. What has prevented LECs from reaching agreement to this point has been a lack of clarity in the ground rules governing ISP dial-up access, and the resulting availability of a major arbitrage opportunity for CLECs, not any inherent difficulty in dividing the revenues for this service: Because CLECs have been able to exploit the service's uncertain regulatory classification to extract enormous subsidies from ILECs in the form of reciprocal compensation payments, they have had no incentive to agree to share access revenues for this traffic. Clearing away that obstacle would encourage CLECs to come to the table and negotiate. To the extent the Commission believes that it needs a more streamlined dispute resolution process in addition to its usual complaint procedures, U S WEST agrees with the Commission that it should make use of the federal arbitration process available under the Administrative Dispute Resolution Act. *See* 5 U.S.C. § 571 *et seq.*; *NPRM* ¶ 32.[7]

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[7] LECs may also need the Commission to enforce carrier self-reporting obligations if the sharing agreements they negotiate use self-reported information as a revenue allocator.

While the Commission should clarify that each LEC carrying part of a dial-up Internet call is entitled to a share of the access revenue received from the ISP, it should not try to dictate the precise content of the LECs' sharing agreement. Put another way, the Commission should continue its policy of "declin[ing] . . . requests to establish guidelines" for revenue sharing. *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd at 7186. An ILEC and a CLEC (or two ILECs or two CLECs) should be free to allocate ISP access revenues according to the number of access lines each carrier sells to non-ISP end users in a given area, or to use some other allocator if they choose.[8] The Commission should continue to permit LECs to negotiate whatever revenue sharing arrangements best suit their needs, with a strong presumption that a voluntarily agreed-upon arrangement is a reasonable one.

Similarly, the Commission should permit ILECs and CLECs, if they find it desirable, to negotiate and resolve some or all of these issues at the industry level. LECs as a group may be able to agree to a standard, carrier-neutral allocation method for ISP dial-up access that carriers could incorporate in their individual revenue sharing agreements, similar to what LECs do now with NECA's Multiple Exchange Carrier Access Billing guidelines. Such voluntary industrywide standards are extremely desirable, since they greatly simplify the negotiation of carriers' bilateral revenue sharing agreements: Because the industry as a whole has settled on a sharing methodology, the negotiating LECs simply have to plug in local data. Indeed, the very possibility of reaching industrywide resolutions of these issues is reason alone to

[8] In some circumstances, they may even voluntarily agree that the costs of negotiating an agreement and accounting for ISP revenues outweigh the benefits of sharing, such that it makes more sense for each LEC to keep the revenues from its own end-user customers.

put ISP dial-up access, like the other jointly provided interstate access services, under the supervision of a single (federal) regulator. A regionwide or industrywide settlement would be impossible to negotiate if fifty-plus regulators were each able to disapprove parts of the agreement.

In sum, LECs have proven themselves able to resolve compensation issues for jointly provided interstate access services, and the Commission has generally been satisfied with the results. There is no reason to adopt a different set of rules and practices simply because the interstate access customer happens to be an ISP rather than a traditional IXC.

B. It Would be Unlawful and Inappropriate To Subject the Negotiation of Revenue-Sharing Arrangements for Joint Provision of Interstate Access Services To Binding State Arbitration under Section 252 of the Telecommunications Act.

Notwithstanding that LECs have successfully negotiated against the backdrop of federal review for every other jointly provided interstate access service, the Commission tentatively concludes that revenue sharing for ISP-bound dial-up calls should be governed by binding state arbitrations under section 252 of the Telecommunications Act. *NPRM* ¶ 30. Such a policy would be both unlawful and unwise.

As a legal matter, the Commission may not expand the scope of state interconnection arbitrations beyond the limits Congress placed on these proceedings, nor may it create new authority for state commissions to impose compensation obligations on LECs out of whole cloth. While ILECs and CLECs may voluntarily negotiate about any number of matters "without regard to" the requirements of the Telecommunications Act, 47 U.S.C. § 252(a)(1), the *only* matters about which the LECs are *required* by section 251 to negotiate are the specific interconnection duties enumerated in sections 251(b) and (c). *See id.* § 251(c)(1). Accordingly, these are the only matters for which an ILEC or CLEC may unilaterally petition a state commission for binding arbitration. *See id.* § 252(b)(1). Congress expressly instructed state commissions to "limit [their] consideration . . . to the issues set forth in the petition" for arbitration, *id.* § 252(b)(4)(A), and authorized them to impose only those conditions "required" to implement section 251 of the Act. *Id.* § 252(b)(4)(C) ("The State commission shall resolve each issue set forth in the petition . . . by imposing appropriate conditions as required to implement" section 252(c), which in turn directs the state commission to "ensure that such resolution and conditions meet the requirements of section 251"). In short, if a matter is not one of the binding duties of a LEC enumerated in sections 251(b) or (c), the LEC is under no duty to negotiate the matter, and there is no basis in the Act for a state commission to impose a resolution of the issue on the LEC.

The Commission has now confirmed that when two LECs carry ISP-bound traffic together, their relationship cannot be governed by the reciprocal compensation provisions in section 251(b)(5), since such traffic is not local. *See Reciprocal Compensation Declaratory Ruling* ¶ 26 n.87.[9] Nor does the obligation to share access revenues among all the LECs who

[9] "As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do not govern inter-carrier compensation for this traffic." *Reciprocal Compensation Declaratory Ruling*, ¶ 26 n.87.

collaborate to provide an interstate access service come from any other provision in section 251(b) or (c) of the Act; to the contrary, as noted above, this duty has existed since well before divestiture.[10] Indeed, the Commission has held in unmistakable terms that intercarrier compensation for interstate access services — as opposed to reciprocal compensation for local traffic — is a matter outside the scope of sections 251 and 252 of the Act:

> [A]s a legal matter, . . . transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

See First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16112-13 (1996) ("*Local Competition Order*"). Because a LEC's duty to share ISP dial-up access line revenues with the LECs that serve the ISP subscribers does not come from sections 251(b) or (c) of the Act, state commissions have no authority to arbitrate the jointly provided access issue under section 252, and the Commission may not create authority where none exists.

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[10] The Commission has foreclosed any claim that intercarrier compensation duties are simply an aspect of an ILEC's general duty to provide "interconnection" to its network under section 251(c)(2). "We conclude that the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. . . . [B]ecause interconnection refers to the physical linking of two networks . . . access charges are not affected by our rules implementing section 251(c)(2)." *Local Competition Order*, 11 FCC Rcd at 15590.

Even if the Commission did possess the legal authority to subject ISP dial-up revenue sharing agreements to binding state arbitration, doing so would be bad policy. As noted above, one of the primary benefits of having LECs negotiate sharing agreements subject to oversight by a single federal regulator is that it permits some or all of the methodological issues to be resolved at the regional or industrywide level. Such an efficient resolution would be impossible if any of fifty-plus regulatory authorities across the country could review and undo these multijurisdictional compromises. Moreover, there is no sustainable distinction between jointly provided ISP dial-up service and any other jointly provided interstate access service in this regard. If the Commission ruled that sections 251 and 252 give states the power to arbitrate LECs' revenue sharing agreements for dial-up Internet-bound traffic, there would be no principled basis for preventing a LEC from demanding binding state arbitration of MECAB's applicability to its jointly provided Feature Group D. The Commission should properly leave the review of carriers' revenue sharing agreements for ISP-bound traffic where it belongs — before the Commission, alongside the sharing arrangements for every other interstate access service.[11/]

[11/] The Commission should also recognize the risk that moving the regulation of this interstate access service to state interconnection arbitrations may restrict the availability of judicial review. At least one court has held that the Eleventh Amendment prevents federal courts from reviewing such arbitrations, notwithstanding 47 U.S.C. § 252(e)(6). *See AT&T v. BellSouth*, ___ F. Supp. 2d ___, 1999 WL 181674 (M.D. La. Mar. 29, 1999).

C. The Commission Should Prevent CLECs from Using Section 252(i) of the Act To Thwart Negotiations and Extend the Unlawful Payment of Reciprocal Compensation Indefinitely.

Regardless of which authority the Commission deems appropriate to review LECs' negotiated agreements, any set of rules relying on voluntary commercial negotiations would be for naught if the Act's "most favored nation" clause could be applied to interstate access. Section 252(i) of the Act directs LECs to "make available any interconnection, service, or network element provided under an agreement approved under this section . . . to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). After several state commissions (incorrectly) held that some early interconnection agreements obligated ILECs to pay reciprocal compensation for ISP-bound traffic, many later-negotiating CLECs have used section 252(i) to demand that they too be paid such compensation for the full term of *their* contracts. As the Commission recognizes, *see NPRM* ¶ 35, permitting such opt-in presents a problem: Because an ILEC's interconnection agreements with different CLECs are staggered depending on when the CLEC requested interconnection, successive CLECs could, as their contracts came up for renewal in turn, use section 252(i) to extend the improper payment of reciprocal compensation *indefinitely.* This would nullify any ILEC right to negotiate revenue sharing agreements for ISP-bound traffic. Indeed, in the short time since the Commission adopted the *Reciprocal Compensation Declaratory Ruling*, several CLECs have already argued that section 252(i) prevents state commissions from declining to extend the payment of reciprocal compensation in new interconnection agreements, the Commission's order notwithstanding.[12]

The Commission should declare that CLECs may not use section 252(i) to extend these unlawful payments in this fashion. On its own terms, section 252(i) does not apply to regulatory obligations imposed outside of a section 251/252 local interconnection agreement; as noted above, revenue sharing arrangements for jointly provided interstate access services do not come within the scope of these sections of the Act. In addition, upon the adoption of these new rules, the Commission should permit ILECs to take a "fresh look" at those transport and termination provisions of their interconnection agreements that state commissions have improperly interpreted to require the payment of reciprocal compensation. The Commission has frequently allowed for similar "fresh looks" in the context of interconnection and access services. *See, e.g.*, Mem. Op. and Order, *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5207-09 (1994); Second Mem. Op. and Order on Recon., *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341, 7345-48 (1993). Permitting LECs to revisit their contracts in this manner does not unfairly disadvantage anybody; CLECs have certainly had notice since the Commission's *Declaratory Ruling* that the payment of reciprocal compensation for ISP-bound traffic could soon end. *See Reciprocal Compensation*

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[12] *See* Washington Telecommunications Newswire, "Incumbents Refuse to Sign Interconnection Deals, Competitors Say" (Mar. 24, 1999) (describing complaints filed by Sprint and Focal Communications after the Commission's *Declaratory Ruling* demanding that Bell Atlantic and Ameritech be required to enter new, full-term interconnection agreements containing improper reciprocal compensation terms).

Declaratory Ruling ¶ 26. Allowing ILECs this "fresh look" is a rational way to prevent CLECs from maintaining their trump card over voluntary commercial negotiations in perpetuity.

III. LECS CANNOT PRACTICABLY SEPARATE ISP-BOUND TRAFFIC SEPARABLE INTO INTERSTATE AND INTRASTATE COMPONENTS.

In the final paragraph of its NPRM, the Commission asks whether it is difficult or inefficient to separate interstate ISP-bound traffic from intrastate ISP-bound traffic. U S WEST believes that, as a practical matter, such separation is prohibitively difficult, at least from a LEC's perspective. A LEC that sells circuit-switched service to an ISP cannot look into the data packets transferred over its connections to determine the destination of any given packet; therefore, the LEC has no way of knowing whether an ISP subscriber, once connected to the ISP, is at any given moment accessing local content maintained or hosted by the ISP, an in-state server maintained by a third party, or an out-of-state or foreign server.

Nor is such tracking feasible elsewhere. An ISP subscriber cannot easily tell the geographic location of the web server he is contacting, or even whether he is connected to a web site's main server, a mirror site, or locally cached content. While ISPs themselves do in theory have some ability to track their subscribers' movements across the Internet, the costs of tracking and reporting the destination of every packet that crosses their networks would likely be substantial, and such comprehensive monitoring would raise subscriber privacy concerns. The

Commission should hesitate before imposing any legal regime that would require ISPs to track their subscribers' activities and substantially raise their costs.

Respectfully submitted,

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DATE: April 12, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of April, 1999, I caused a true copy of the foregoing Comments of U S WEST Communications, Inc. to be served by hand delivery upon the persons listed on the attached service list.

Carole A. Walsh

Carole A. Walsh

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